

(1)

Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVENS
CLERK

88-1655

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

JOHN W. SOWERS,
Pro Se

VS.

UNITED STATES OF
AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JOHN W. SOWERS
PRO SE

MARCH 1984

34 pp

(i)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit Court of Appeals has denied the Petitioner his Sixth Amendment right to effective counsel when it denied the Petitioner's habeas corpus petition.
2. Whether the Tenth Circuit Court of Appeals has effectively denied the Petitioner his Sixth Amendment right to effective counsel by; first, denying the Petitioner his substantive right on direct appeal due to counsel's negligence and; second, by denying the Petitioner his post-conviction remedy because of counsel's incompetence.

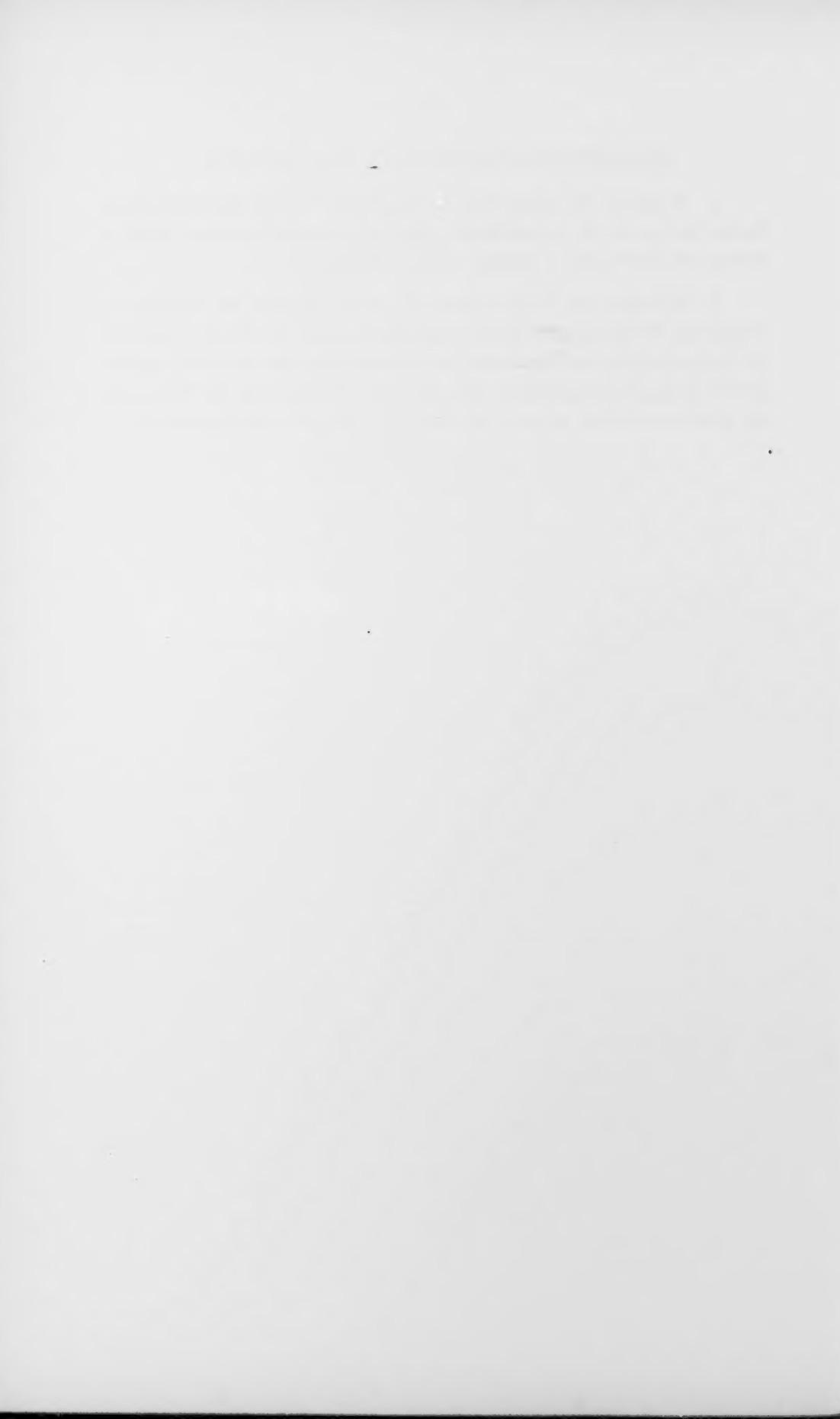


Table of Contents

	<u>Page</u>
Questions Presented.....	(i)
Opinions and Orders Below	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
The Court Below Has Decided an Important Constitutional Question Severely Limiting Petitioner's Right To Reasonable and Competent Counsel	8
Conclusion	15
Appendix 'A' — Order of the Tenth Circuit Court of Appeals Denying the Petitioner's Direct Appeal — March 15, 1982.	A-1
Appendix 'B' — Order of U.S. District Court Denying Petitioner's Motion to Vacate Sentence —	B-1
Appendix 'C' — Order of the Tenth Circuit Court of Appeals Affirming the Denial of Petitioner's Motion to Vacate Sentence — January 12, 1984.	C-1
Appendix 'D' — Affidavit of Petitioner, John W. Sowers	D-1

Table of Authorities

1. Berger v. United States, 295 U.S. 78 (1935).	12
2. Bucklew v. United States, 575 F. 2d 515 (5th Cir. 1978).	10
3. Carafas v. Lavalles, 391 U.S. 234 (1968).	2
4. Dyer v. Crisp, 613 F. 2d 275 (10th Cir. 1980).	8
5. Irvin v. Dowd, 366 U.S. 717 (1960).	11
6. McMann v. Richardson, 397 U.S. 759 (1970).	9
7. United States v. Carroll, 678 F. 2d 1208 (4th Cir. 1982).	13
8. United States v. Singer, 660 F. 2d 1295 (8th Cir. 1981).	13
9. United States v. Cronic, 675 F. 2d 1126 (10th Cir. 1982).	9
10. United States v. Crouthers, 669 F. 2d 635 (10th Cir. 1982).	8
11. United States v. Farnkoff, 535 F. 2d 661 (1st Cir. 1976).	13
12. United States v. Hinton, 631 F. 2d 769 (D.C. Cir. 1980).	10
13. United States v. Jackson, 627 F. 2d 1198 (D.C. Cir. 1980).	14
14. United States v. Jones, 696 F. 2d 479 (7th Cir. 1982).	12
15. United States v. Kobrosky, 711 F. 2d 449 (5th Cir. 1983).	9
16. United States v. Radeker, 664 F. 2d 242 (10th Cir. 1981).	7, 14
17. United States v. Nolan, 571 F. 2d 528 (10th Cir. 1978).	9

United States Constitution

1. Sixth Amendment 2, 8, 9

United States Code

1. 28 U.S.C. '2255 2, 8, 9



NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

JOHN W. SOWERS,
Pro Se

vs.

UNITED STATES OF
AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

The Petitioner (defendant below) seeks a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit entered below.

The case below was styled *United States of America vs. John W. Sowers* and was decided on January 12, 1984.

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is unpublished and can be found herein in Appendix 'C' (Order of January 12, 1984). Certain relevant opinions and orders of the United States District Court for the Western District of Oklahoma are unpublished but appear herein as Appendix 'B' (Order of 1983). Another relevant unpublished opinion of the United States Court of Appeals for the Tenth Circuit can be found herein as Appendix 'A' (Order of March 15, 1982).

The Petitioner believes jurisdiction to hear this action is conferred upon this Court by 28 U.S.C. § 1254 (1). Moreover, this court is not denied jurisdiction to hear this habeas corpus case because the

Petitioner is presently on parole. Today, the habeas corpus petition may be brought when there is a restraint of liberty, *Carafas v. Lavaller*, 391 U.S. 234, 238-239, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968).

The Opinion of the Court of Appeals for the Tenth Circuit was entered on January 12, 1984.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which states in its entirety:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

In addition, this action was brought under the provisions of 28 U.S.C. §2255, which states in its entirety:

“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

“A motion for such relief may be made at any time.

“Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or

that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

“A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

“The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

“An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”

STATEMENT OF THE CASE

The Petitioner, John W. Sowers, was indicted in the Western District of Oklahoma on February 7, 1980. The indictment charged the Petitioner, an attorney from Kansas, with ten counts including: conspiracy, Title 18, United States Code, Section 1341; wire fraud, Title 18, United States Code, Section 1343; and interstate transportation of property obtained by fraud, Title 18, United States Code, Section 2314. The indictment stemmed from the “Mayan God Project”, a contractual arrangement to solicit funds and sell interests in stone sculptures that were purchased in Guatemala. The contractual agreement between those charged named the Petitioner as escrow agent, along with defendant Ovid Kosovsky, and co-conspirator Robert Bolton as principals. A fourth person not named in the contract but indicted as a co-conspirator was Raymond Bean, who was selling interests through Bolton under the contract. Defendant

Kosovsky was to obtain the stone sculptures in Guatemala. Co-conspirator Bolton was to provide the funds to purchase them. Petitioner, as escrow agent, was to hold the sculptures until both principals, i.e., Bolton and Kosovsky, fulfilled their obligations under the contract.

A short time prior to the trial, the co-conspirators, Bolton and Bean, pled guilty to related charges named in the indictment. The day before trial, co-defendant Kosovsky also pled guilty.

Because of the length of the case, the complexity of the evidence presented, and for the convenience of the court, a certified copy of the trial transcript has been submitted to the Court.

During the Petitioner's three and one-half week trial, which commenced on June 17, 1980, in the United States District Court for the Western District of Oklahoma, the government put on twenty-four witnesses and approximately one hundred and ninety (190) exhibits.

The tenor of the trial was established the very first day when the government called Donald Baird, an investor in the alleged fraudulent scheme. On direct examination, Mr. Baird testified that he gave \$12,500 to Bolton as an investment in the Mayan God Project, although he did not know what the Petitioner was to receive, if anything, from the investment money (Tr. 119). On cross-examination, defense counsel properly elicited from Baird that the Petitioner did not draw up the agreement that Baird signed (Tr. 164), nor did Petitioner have any contact with Baird until the day he signed the agreement with Bolton (Tr. 172). Furthermore, the agreement provided for co-conspirator Bolton to pay Baird back, not the Petitioner (Tr. 171). Nevertheless, the prosecutrix immediately began to offer exhibits that had nothing to do with the Petitioner (Tr. 130). They were neither drawn by him, signed by him, nor seen by him (Tr. 133). Furthermore, the trial judge conditionally admitted the exhibits subject to being linked-up later (Tr. 136). At the end of Baird's testimony, when the Petitioner's defense counsel objected to relevancy, the court gave a cautionary instruction relating to co-conspirator statements (Tr. 210).

The government's next witness was Dr. Raymond Thompson, an archaeologist from the University of Arizona. Before Dr. Thompson testified, the Petitioner's defense counsel objected to his testimony on the ground that the doctor's testimony was irrelevant and prejudicial. Dr. Thompson was to testify that another investor in the Mayan Project brought a stone object to him which he labelled as fake (Tr. 211). The Petitioner's defense counsel argued at the bench conference that indeed this evidence could not be connected to Petitioner because he was never told of this finding nor was there evidence that this stone object was one of the stones related to the alleged fraud scheme (Tr. 213). The government's counsel argued it could be traced to the Petitioner and that the tracing would be linked-up later in the case (Tr. 212). The trial judge conditionally overruled defense counsel's objection on the ground that the evidence would be linked-up later (Tr. 216).

The government prosecutrix argued at the bench conference that Dr. Thompson was to testify to the authenticity of the stone sculptures, however, the first substantive question she asked was whether it was illegal to bring the stone sculptures into this country (TR. 225). The Petitioner's defense counsel objected on the grounds that Dr. Thompson was not a legal expert nor was the Petitioner charged with bringing these stones illegally into the country (TR. 227). The court responded that a cautionary instruction would be given (TR. 227). Dr. Thompson testified that he never had any contact with Petitioner (TR. 238).

The next witness that was brought to the stand was an investor in the Mayan God Project, Eugene Kralik. Kralik testified that he was originally contacted by Mr. Simmons and decided to invest in the project (Tr. 300). He testified that he originally met with Simmons and Bolton prior to investing (Tr. 301) and later with the Petitioner subsequent to the signing of the investment agreement (Tr. 427, 429). To this testimony on direct examination the court once again gave a cautionary instruction regarding co-conspirator hearsay even though the Petitioner's counsel made no relevant hearsay objection (Tr. 380).

The next investor-witness called by the government was David Brouse. As previously stated, Brouse first learned of the project

through other investors, namely Bolton, a Mr. Massey, and a Mr. Eugene Anderson (Tr. 445). Brouse called the Petitioner one time before he signed the agreement to invest with Bolton and spoke to him twice following the execution of the agreement (Tr. 459). Brouse testified that the Petitioner knew so little about the agreement between Brouse and Bolton that he sent a letter to Brouse to find out the exact terms of this agreement (Tr. 472). Moreover, Brouse further testified that he received a letter sent by Petitioner to Bolton which related the Petitioner's fears that Bolton was grossly violating the terms of the contract between Bolton and Kosovsky (Tr. 537). Along with Brouse and Bolton, the Petitioner sent copies of this letter to Anderson, Baird, Kralik, Bean, and Eenegren (Tr. 544). On the Petitioner's counsel's request, the trial court gave a cautionary instruction relating to co-conspirator hearsay (Tr. 553). However, Petitioner's counsel did not lodge a hearsay objection at this point. Again, the court allowed this hearsay to be admitted subject to link-up by the government.

Another government witness whose testimony related to the authenticity of the art objects was a Mr. Mike Mayfield, the Chief of the Division of Museums for the State of Wyoming (Tr. 702). Again, the government prosecutrix sought to illicit the law on "illegal importing" although it was not relevant to the charges brought against the Petitioner (Tr. 722). Once again, the trial court allowed the admission of this evidence on a cautionary instruction (Tr. 739).

The next investor called to the stand was Mr. Edgar Dwire, an attorney who worked in the same community as the Petitioner. Although Dwire spoke of the Petitioner very highly during his testimony (Tr. 755) and stated that at no time was he told by the Petitioner that the art objects were authenticated (Tr. 747). The prosecutrix strenuously attempted to force Dwire to tell the jury that Petitioner was a dishonest man because he did not relate his knowledge that the objects were fake (Tr. 748-753). Dwire also testified that when he told Petitioner that the Federal Bureau of Investigation had contacted him about the art objects, the Petitioner told him to "tell the truth" (Tr. 768). At this point the prosecutrix attempted to have Dwire read to the jury documents that he had never seen prior to trial in an attempt to impeach Dwire, their witness (TR. 782-789). In response to defense counsel's objection, the prosecutrix asserted that they could

establish the document's relevancy if the court would allow them to be admitted provisionally (Tr. 782). The trial court allowed this evidence to be admitted subject to link-up (Tr. 790), as they had done with much of the prior evidence.

The next investor that was called by prosecutrix was a Mr. Ronald Warner, a president of a small plastics company in Alabama. It was through Warner's testimony that the type and amount of hearsay testimony can be graphically illustrated (Tr. 804). From the beginning to the end, Mr. Warner said little about the Petitioner but stated volumes of hearsay relating to other co-conspirators (Tr. 806, 810, 814, 815, 817). Warner testified that at one point during the period of his involvement, the Petitioner stated that he was having problems due to the actions of Bolton (Tr. 820, 821). Although counsel for Petitioner made relevancy objections, he made no hearsay objections during Warner's testimony. During Warner's testimony the court again allowed the prosecutrix to conditionally admit exhibits (Tr. 817) accompanied by another cautionary instruction relating to hearsay subject to link-up (Tr. 831).

At this point, it is unnecessary to examine in detail the testimony of the remaining government's witnesses because throughout the remainder of the trial the same objections to relevancy were made by Petitioner's counsel and the same cautionary instructions relating to both co-conspirator hearsay and plain hearsay were made (Tr. 836, 862, 908, 911, 916, 931, 980, 1395, 1418). The trial court did show concern over the deluge of evidence, and the amount of hearsay admitted (Tr. 1130-1135, 1856-1858). However, the case was submitted to the jury without the requisite findings commended by *United States v. Radeker*, 664 F. 2d 242 (10th Cir. 1981).

The trial court acquitted the Petitioner on two of his ten counts and the jury convicted the Petitioner of six of the remaining eight counts, being unable to reach a decision on the other two counts. On September 8, 1980, Petitioner was sentenced to six concurrent terms of two and one-half years imprisonment.

The Petitioner then sought a direct appeal in the Tenth Circuit in case number 80-1974. The Tenth Circuit rejected the Petitioner's

claims of failure to interview jurors post-conviction regarding possible misconduct, insufficiency of the evidence, and improper admission of co-conspirator hearsay. (See Appendix 'A')

Subsequent to the Petitioner's direct appeal to the Tenth Circuit, the Petitioner filed three Motions to Reduce Sentence pursuant to Rule 35, *Federal Rules of Criminal Procedure*. All three motions were denied by the trial court.

Petitioner then sought post-conviction relief pursuant to Title 28, *United States Code*, Section 2255, asserting the grounds of prejudicial joinder of co-conspirators; ineffective counsel; bias on the part of the trial court; and prosecutorial misconduct. Both the District Court and the Tenth Circuit Court of Appeals denied the Petitioner relief. (See Appendix "B" and "C")

REASONS FOR GRANTING THE WRIT

The Court Below Has Decided An Important Constitutional Question Severely Limiting Petitioner's Right to Reasonable and Competent Counsel.

It is fundamental that citizens of the United States are guaranteed the right to effective assistance of counsel by the Sixth Amendment of the United States Constitution. It is also fundamental that Petitioner's legal representative's failure to comply with the requisites for reasonable and competent counsel comprises that guaranteed right.

The standard used in determining whether defense counsel's representation falls below that level required to preserve the Petitioner's Sixth Amendment right was succinctly stated in *Dyer v. Crisp*, 613 F. 2d 275 (10th Cir. 1980) as being: "The Sixth Amendment has been interpreted as guaranteeing effective assistance of counsel." *Id.* at 278 "The Sixth Amendment requires that assistance of counsel be measured against a standard higher than "sham or mockery" and rise to a level of reasonably competent assistance of counsel." *Id.* Petitioner recognizes that the reasonable and competent standard enumerated in *Dyer* does not require perfect or errorless representation. *United States v. Crouthers*, 669 F. 2d 635, 642 (10th Cir. 1982). However, Petitioner asserts that counsel's representation

falls well below the reasonable and competent standard demanded by *Dyer*. The consequences of this ineffective representation by defense counsel was to deny Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment. *CP. Dyer v. Crisp* with *United States v. Cronic*, 675 F. 2d 1126 (10th Cir. 1982).

Petitioner also recognizes that inexactness of the definition of "effective counsel". This generality is displayed in *United States v. Nolan*, 571 F. 2d 528 (10th Cir. 1978). Here, the court does not define effective representation, but instead lists that which will not constitute a proper claim under "ineffectiveness of counsel":

"It is our opinion that absent the incompetence of counsel or some other exceptional circumstance, a defendant will be bound by decisions of his counsel. Mistakes of judgment on the part of counsel or mistakes of tactics, strategy or policy in the course criminal trial do not constitute grounds for a later collateral attack pursuant to section 2255."

Id at 534.

The main thrust of Petitioner's contention is that numerous errors unaddressed by defense counsel at trial constitute the exceptional circumstances of *Nolan* and clearly show that defense counsel's incompetence has rendered the Petitioner's representation ineffective.

In *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Fed. 2d 763 (1970) this court indicated that the proper procedure for reviewing defense counsel's actions would not be a retrospective approach, but would be "whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 773. In addition to the case law above, it is also comprehensible that a lack of evidence or a failure to show prejudice will not establish a claim of ineffective counsel.

In *United States v. Kobrosky*, 711 F. 2d 449 (5th Cir. 1983), where the Petitioner alleged ineffective assistance of his trial counsel, the Court of Appeals ruled that the District Court's denial of the Petitioner's motion to withdraw his guilty plea was not an abuse of discretion. The Circuit Court emphasized that: "No extrinsic evidence was offered either to buttress the allegations of ineffectuality or

to counter the government's protest that it would be significantly prejudiced were Kobrosky allowed to withdraw his plea." *Id.* at 457. In contradistinction to *Kobrosky*, the record in the case at bar clearly reveals that this case is rift with evidence that defense counsel's representation does not even approach the minimal requirements of the reasonable and competent standard. *See United States v. Hinton*, 631 F. 2d 769 (D.C. Cir. 1980). The Petitioner does not deny that defense counsel made numerous objections at trial, cross-examined witnesses, and presented evidence. Petitioner also recognizes that these practices are factors that weigh heavily in the court's determination of whether counsel has acted reasonably and competently. However, the salient point of Petitioner's argument is that although defense counsel employed the above mentioned practices, he failed to interpose these and other tactics at the critical points in the trial fundamental to Petitioner's defense. While the Petitioner is cognizant that such inaction may be within defense counsel's permitted trial strategy, he asserts that failure to implement these functions during these crucial points of trial clearly removes his inaction from the realm of trial strategy and squarely places them within the ambit of ineffectiveness.

The essential element of the Petitioner's defense as produced by his counsel was that Petitioner was unaware that the art objects were false. On the other hand, the prosecutrix produced three expert witnesses at the trial who testified as to their opinions of the lack of authenticity and newness of the objects of art. Petitioner made numerous requests of defense counsel to secure as a witness, Mr. Mohammed Moghbel, a recognized national museum restoration expert, Norman, Oklahoma, who expressed an opinion to the effect that the stone sculptures of Petitioner, which he had examined, were very, very old in age. An opinion which Petitioner relied upon heavily. Defense counsel, even after receiving \$500 from Petitioner for the stated purpose of interviewing this and other critical witnesses, failed to do so (See Appendix 'D').

In *Buckelew v. United States*, 575 F. 2d 515 (5th Cir. 1978), the Fifth Circuit Court of Appeals addressed an allegation of ineffective counsel which was based on defense counsel's failure to produce a witness. The court's response to appellant's assertion was that: "complaints of uncalled witnesses are not favored because the

presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. *Id.* at 521. The instant case is clearly distinguishable from *Buckelew*. The expert witness that Petitioner requested defense counsel to call was not an out of state witness as in *Buckelew*. Furthermore, Petitioner had detrimentally relied on Moghbel's opinion as an expert that the stone sculptures were authentic. The prosecutrix whole case was based on whether the stone sculptures were false and whether Petitioner had knowledge of such facts. In light of Petitioner's earlier reliance on Moghbel's opinion and his consistent assertion that he had no knowledge that the stone sculptures were only copies, clearly takes this proposed witness' testimony outside the spectrum of speculation (*See Appendix 'D'*). It is obvious that the failure of defense counsel to call to interview or to call this prospective witness after petitioner's request to do so amounts to behavior uncommensurate with that of a reasonable and competent attorney.

In addition to defense counsel's failure to present a substantive witness for Petitioner, on several occasions during trial it was brought to both counsel and the court's attention that specific instances of jury misconduct had occurred (Tr. 2837). At the outset of this misconduct, defense counsel moved for a mistrial, which was subsequently denied (Tr. 2911). Although the record makes it clear that defense counsel made this motion, it also makes it clear that he failed to pursue the several remaining instances of jury misconduct (Tr. 2917, 2918, 2938). This failure was especially fatal because the impropriety on the part of the jurors clearly influenced their opinions.

In *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1960) this court stated, "the test is "whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the judgment need not necessarily be set aside. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed." *Id.* at 756. (Citing *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1878).

In the case at bar, partiality clearly existed because the one juror holding out, Mr. Simmons, was referred to as being "a stubborn black" (Tr. 2871). Several jurors formed the opinion that he would be trouble from the start (Tr. 2856). This negativism toward juror Simmons, the only black juror, because of his belief in Petitioner's innocence was transferred to Petitioner, and resulted in the guilty verdict. Furthermore, juror Golightly was heard several times telling alternate juror Bowman what the jury count was during the deadlock (Tr. 2837, 2917, 2938). This incident is directly analogous to *United States v. Jones*, 696 F. 2d 479 (7th Cir. 1982), where this Court of Appeals ruled that the defendant was tried by an impartial jury because: "The trial judge in each instance questioned the potential jurors regarding the sensitive areas surrounding the trial, including the facts that drugs were involved and that one or both of the defendants might choose to not testify at trial. Except for the two dismissed panel members, no juror displayed prejudice. Moreover, neither defendant pressed for dismissal of any panel member other than those that eventually were dismissed."

In the case at bar, defense counsel did not seek to have any juror replaced by the alternate jurors available, nor did he attempt to carry forth the challenge as required by *Irvin*, 366 U.S. at 717.

Defense counsel, in his vain attempt at representation, furthered his ineffectiveness by his blatant failure to take any action during the prosecution's closing argument. It is well settled law that a prosecutrix while allowed to draw reasonable inferences and conclusions from the evidence, cannot misstate the facts or mislead the jury. In *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935) this court stated: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Id. at 88.

This court further concluded that, "a new trial was in order where the prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense as shown by the

record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner." *Id.* at 84.

In the case at bar the prosecutrix made repeated misstatements of material fact. She constantly referred to Petitioner as a "liar" and a "phoney" (Tr. 2718, 2727, 2733) and sought to include in the record facts not in evidence at the trial (Tr. 2722, 2724, 2730, 2790, 2791, 2792, 2795, 2796). Her actions were more prejudicial in volume and substance than those contemplated by this court in *Berger* (CF Tr. 130, 225, 227, 722, 748-753, 782-789). Although defense counsel objected to some misstatements of fact made by the prosecutrix, he failed to ask the court for a curative instruction. See *United States v. Farnkoff*, 535 F. 2d 661 (1st Cir. 1976). He further failed to object to the prosecutrix's repeated attacks that Petitioner was "a liar" and was "a phoney" (Tr. 2718, 2727, 2733). Granted, in a case where a curative instruction was given or where the case evidenced overwhelming proof against the defendant, such statements would not constitute prejudicial error. But, in the present case, the government's case was far from overwhelming, no curative instruction was given, and the jury could easily be swayed because of the deluge of exhibits and length of the trial. Moreover, the validity of Petitioner's truthfulness was of paramount issue in determining whether he intended to defraud investors. See *United States v. Carroll*, 678 F. 2d 1208, 1210 (4th Cir. 1982); *United States v. Singer*, 660 F. 2d 1295, 1305 (8th Cir. 1981). As such, the result of the non-action of Petitioner's defense counsel in regard to prosecutrix's repeated improper remarks, insinuations, and misstatements of evidence could only cause the Petitioner to be denied a 'fair trial' and to be denied effective assistance of counsel.

Although the above cited errors by Petitioner's counsel occurred only at periodic phases during the trial, counsel's most grievous

error occurred throughout the trial. The government's main theory at trial was that Petitioner was a co-conspirator in a scheme meant to defraud investors. In its effort to convict Petitioner, the government produced countless witnesses who testified as to alleged conversations with co-conspirators, and other investors (Tr. 229, 293, 324, 330, 448, 572, 595, 708, 804, 806, 810, 814, 815, 817, 881, 906). The rule regarding hearsay testimony of co-conspirators is well settled in *United States v. Radeker*, 664 F. 2d 242 (10th Cir. 1981). In *Radeker*, the court held: "a co-conspirator's hearsay statement is not admissible unless the trial judge finds three facts by a preponderance of the evidence. The trial judge must determine that the conspiracy existed, that the declarant and the particular defendant were members of the conspiracy, and that the statement was made during the course of and in furtherance of the conspiracy." *Id.* at 243 (citing *United States v. Andrews*, 585 F. 2d 961 (10th Cir. 1978)). The *Radeker* further cited the *Andrews* case stating, "testimony, otherwise hearsay, offered against a co-conspirator cannot be admitted unless the existence of the conspiracy is established by independent evidence." *Id.* at 244 (quoting *Andrews*, 585 at 966). In the case at bar, the government prosecutrix was consistently allowed by the trial court to admit into evidence alleged acts and declarations of alleged co-conspirators and others under the guise of a cautionary instruction "subject to later link-up" (Tr. 210, 381, 553, 739, 831). The prosecutrix failed to link-up these witnesses' statements to Petitioner's actions and did not provide the independent basis required by the *Andrews* case (Tr. 1130-1135, 1856-1858, 2712). Furthermore, defense counsel failed to make appropriate hearsay objections at trial. The objections that were made by defense counsel were focused primarily upon relevancy of testimony and documents being introduced, not co-conspirator hearsay.

(See Appendix 'A' at pg. 8). See also *United States v. Jackson*, 627 F. 2d 1198, 1218-1219 (D.C. Cir. 1980).

The court in *Radeker*, 664 F. 2d at 242, also stated that co-conspirator hearsay is inadmissible only if there is a proper objection by defendant (hearsay). Thus, defense counsel's failure to properly object has been critical. On direct appeal the Petitioner alleged that the co-conspirator hearsay evidence should have been excluded. The Tenth Circuit denied his appeal based on the fact that defense

counsel failed to properly object to any of the hearsay testimony. (See Appendix 'A' at pg. 8). Moreover, relying on this ruling, Petitioner sought to have his sentence vacated by Tenth Circuit on the basis of ineffective counsel. The court ruled that Petitioner's counsel was competent and not ineffective (See Appendix 'C'). The Petitioner now asserts that competent, effective counsel could not have failed to object to volumes of hearsay evidence which infected Petitioner's entire trial and led to a verdict of guilty. Moreover, Petitioner asserts that the Court of Appeals for the Tenth Circuit cannot, consistent with the Sixth Amendment, deny Petitioner reversal based on defense counsel's non-action and, then on post-conviction, state that counsel's non-action constituted effective assistance of counsel. From the foregoing, it is crystal clear that defense counsel has denied the Petitioner effective assistance of counsel by jettisoning his responsibilities onto the shoulders of Petitioner himself. *McMann*, 377 U.S. 773.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

John W. Sowers, Pro Se

P.O. Box 23026
Oklahoma City, OK 73123
(405) 373-3739

March, 1984



APPENDIX

'A'



UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCH TERM—March 15, 1982

Before Honorable Oliver Seth, Honorable Stephanie K. Seymour and
Honorable John W. Peck*, Circuit Judges.

UNITED STATES OF AMERICA,)	
)	
	Plaintiff-Appellee,) <u>JUDGMENT</u>
)	
vs.)	No. 80-1974
)	or
JOHN W. SOWERS,)	No. 80-26-T
)	
	Defendant-Appellant.)
)	

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that ----- John W. Sowers, appellant, shall, **within thirty (30) days from and after the date of the filing of the mandate of this court in the district court**, surrender himself to the custody of the United States Marshal for the Western District of Oklahoma in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

* Of the Sixth Circuit Court of Appeals, sitting by designation.

APPENDIX

'B'

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

OKLAHOMA CITY, OKLAHOMA

DATE May 24, 1983

United States of America,)
)
)
 Plaintiff(s))
)
 vs.) NO. CR-80-26-T
)
)
John W. Sowers,)
)
)
 Defendant(s))

ENTER ORDER

Upon consideration, they being wholly without merit, defendant's Motion for Disqualification of Judge and Review of Defendant's Applications for relief Under Rules 35 and 2255 are denied.

ABOVE ORDER ENTERED BY DIRECTION
OF JUDGE RALPH G. THOMPSON

Herbert T. Hope, Clerk

By /s/ Irene Higginbotham.

Deputy

COPIES MAILED TO:

PARTIES OF RECORD



APPENDIX

'C'



UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)
)
)
Plaintiff-Appellee,)
)
)
v.) No. 83-1626
) (D.C. No. 80-26-T)
JOHN W. SOWERS,) (W.D. Okla.)
)
)
Defendant-Appellant.)

ORDER AND JUDGMENT

Before SETH, Chief Judge, McKAY and SEYMOUR, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed.R.App.P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This is an appeal from an order of the district court dismissing the appellant's motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255. The appellant was convicted of Conspiracy, Mail Fraud, Wire Fraud, Interstate Travel in Aid of a Fraudulent Scheme and Interstate Transportation of Property Obtained by Fraud. He alleged in his motion four grounds for relief: 1) prejudicial joinder of alleged coconspirators; 2) various instances of ineffective assistance of counsel; 3) bias of the trial judge; and 4) prosecutorial vindictiveness.

The first issue was raised in the appellant's direct criminal appeal. See *United States v. Sowers*, Unpublished No. 80-1974 (10th Cir. filed March 15, 1982). Absent an intervening change in law "[a]n issue disposed of on direct appeal will generally not be reconsidered on a collateral attack by a motion pursuant to 28 U.S.C. § 2255." *United States v. Nolan*, 571 F.2d 528, 530 (10th Cir. 1978).

As for the appellant's second contention, we have reviewed the record and conclude that the appellant was not denied the effective assistance of counsel at trial, *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.).

cert. denied, 445 U.S. 945 (1980), or subsequently, *Ross v. Moffitt*, 417 U.S. 600 (1974). The allegations consist of complaints about tactical decisions. "Mistakes of judgment on the part of counsel, or mistakes of tactics, strategy or policy in the course of a criminal trial do not constitute grounds for a later collateral attack pursuant to Section 2255." *United States v. Nolan*, 571 F.2d at 534. See 10th Cir. R. 17(b).

Nor is there anything in the record to support the appellant's claims of judicial bias and prosecutorial vindictiveness.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

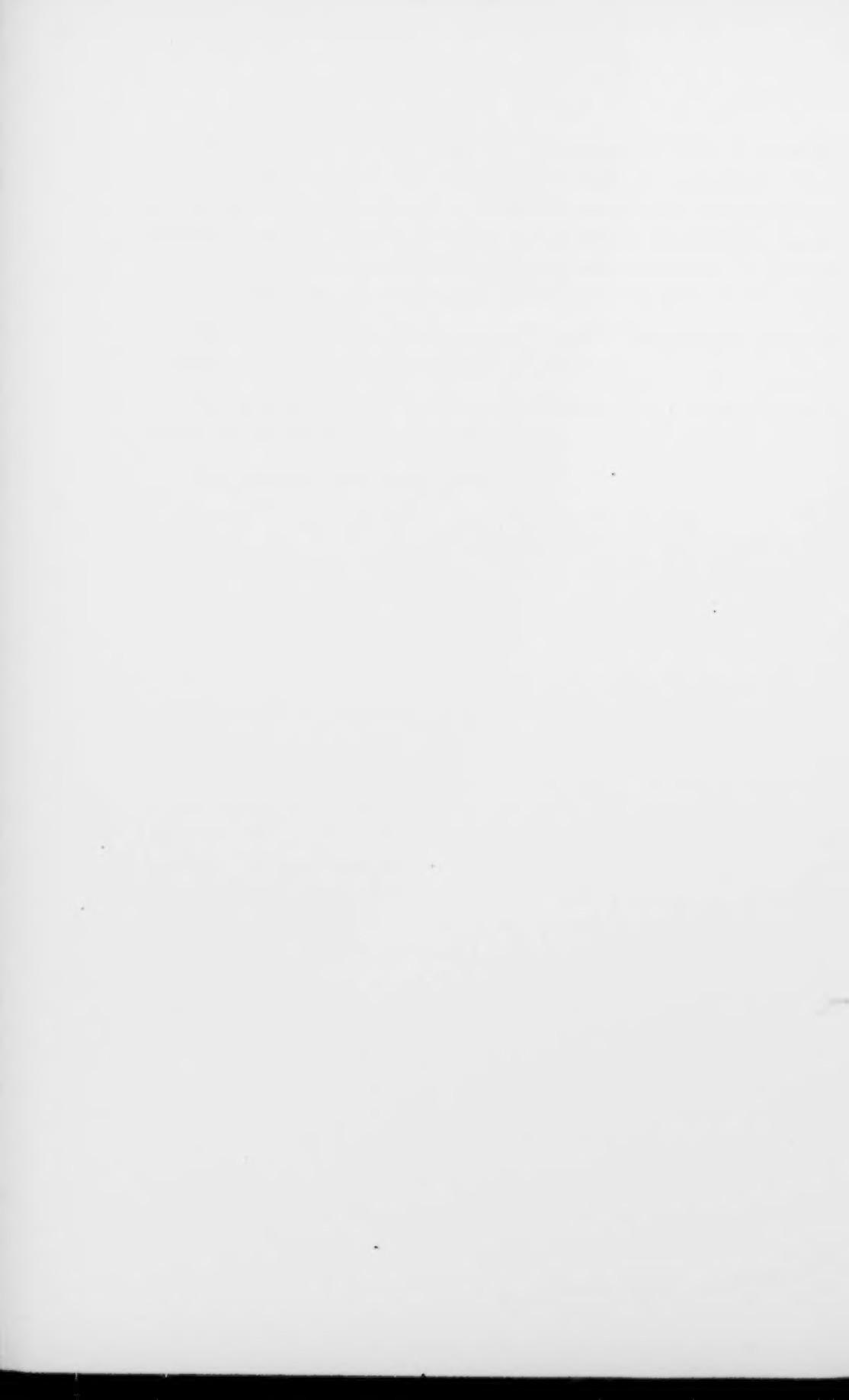
The mandate shall issue forthwith.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

APPENDIX

'D'



State of Oklahoma)
County of Oklahoma) ss: AFFIDAVIT

I, John Wilbur Sowers, do hereby depose and state:

1. I provided defense counsel, William Burkett, a list of critical witnesses at least eight weeks prior to trial. He charged \$500, which was paid, for the services of Mr. Bob Hammer, a private investigator, to contact and interview same. The week the trial commenced, Burkett upon my inquiry advised me that Hammer had not taken the case and had not interviewed my witnesses. The single most critical witness, Mohammed Moghbel, Norman, Oklahoma, was a nationally recognized art restoration expert for major United States museums who had examined four of the broken sculptures over a period of months. Moghbel stated his opinion that they were very, very old. An opinion I valued and which was the basis upon which I invested \$250,000 personally in the project. Mr. Burkett did not interview Moghbel nor call him as a witness.

2. The prosecutrixes, Pence and Pritchett, continually misstated facts, distorted evidence, and lied to the judge and jury. One such critical blatant statement in the final argument was to 'the fact', not in evidence, and absolutely false, that I had the Bolton collection of stone sculptures, those invested in by the government's witnesses, in my sole name and control. They knew this was a falsehood. They further manipulated the daily press reporting by taking the young impressionable courthouse reporter at days' end to their office where they filled his notes with prosecutorial flavored versions of the day's testimony during the periods of excessive absence of the reporter from the proceedings. Pritchett was also seen talking to juror Kay Bolles in the courtroom corridor during the trial which both Pritchett and Pence denied. They were observed by numerous persons including defense counsel. The jurors were observed carrying the daily newspaper into the jury room. Finally, prosecutrix was observed making more than twenty direct misquotes of the record in their 10th Circuit Abstract of the Record which is professionally inexcuseable and typical of their ethical disregard for Petitioner's constitutional right during the trial to a "fair trial".

3. Burkett, defense counsel, failed to advise Petitioner that he was inexperienced in criminal defense undertakings. At sentencing of Peti-

tioner, Burkett admitted to the court and to Petitioner this fact, after the fact, which is in the record.

4. The voir dire was conducted entirely by the trial judge in a matter of less than two hours. Burkett did not ask one question of one juror. Burkett waived eleven peremptory challenges of the Petitioner. Burkett was ineffective, knew it, and secreted this critical fact from Petitioner until too late for Petitioner to secure competent criminal defense counsel.

5. The prosecution denied wire tap and mail interception. Petitioner will go to his grave knowing they lied about both. The above and foregoing facts are true and correct to the best of my knowledge and belief.

/s/ John Wilbur Sowers
John Wilbur Sowers

Subscribed and sworn to before me this 7th of March, 1984.

/s/ Baree Earp
NOTARY

My commission expires: Jan. 27, 1988.

LINN, HELMS, KIRK & BURKETT
 ATTORNEYS AND COUNSELORS AT LAW
 SUITE 410 FIDELITY PLAZA
 ROBERT S. KERR AT ROBINSON
 OKLAHOMA CITY, OKLAHOMA 73102

May 29, 1980

AREA CODE 405
 239-6781

John W. Sowers
 1200 Douglas
 Wichita, KS 67202

RE: USA v

2- -80 February Xerox — 97 @ 25¢	\$	24.25
3- -80 March Xerox — 340 @ 25¢		85.00
4-09-80 Letter to Mr. Sowers		31.25
4-10-80 Review of documents; Preparation		312.50
*4-14-80 Paid Bob Hammer, retainer		500.00
*4-14-80 Conference with John; Conference with Bob Hammer		375.00
4-14-80 Conference with client and Wm. R. Burkett; Conference with Bob Hammer		210.00
4-15-80 Call to John Sowers, go to FBI office		315.00
4-16-80 Conference with client; Call to Suzie Pritchett; Conference with Wm. R. Burkett; Call from Kosovsky		150.00
4-17-80 Conference; Call to Dr. Kelly; Call to Garvin Isaacs; Conference with Wm. R. Burkett		265.00
4-17-80 Conference with Neil Kosovsky et al; Preparation; Telephone conference with Suzie Pritchett; Telephone conference		625.00
4-21-80 Call to Lee Turner		30.00

LINN, HELMS, KIRK & BURKETT

4-22-80	Research on Motions; Conference with Suzie Pritchett; Call from John Sowers; Call to Richard Rumsey Call to Errol Myers	\$ 240.00
4-23-80	Call from Errol Myers; File Motions and briefs	510.00
4-24-80	Travel to Wichita; Conference with Dick Rumsey, Lyle Baker, John Sowers, Ed Dwire; Don Satterthwaite	600.00
4-25-80	Conference with Bill Middeton, John Sowers	240.00
4-28-80	Call from Mr. Isaacs, Call to John Sowers; Call from Mr. Isaacs; Conference with Suzie Pritchett	90.00
4-29-80	Call from Linda Pence; Conference with Wm. R. Burkett	45.00
4- -80	Call to John Sowers	25.61
5-01-80	Appearance at Motions Court	135.00
5-02-80	Draft Journal Entry; Call to Suzie Pritchett; Conference with Garvin Isaacs and Onid Kosvosky	60.00
5-05-80	Call to John Sowers	30.00
5-06-80	Call to Linda Pence; Call from Pence; Call to John Sowers; Call to Isaacs	75.00
5-07-80	Call from John Sowers; Call to John Sowers; Call to Pence; Call from Pence; Call to Bob Hammer	90.00
*5-08-80	Call from Mr. Isaacs; Call to Mr. Isaacs; Call from Bob Hammer	30.00
5-09-80	Conference with Linda Pence	105.00
5-09-80	Conference with Linda Pence, et al; Review of evidence; Prepare for trial	250.00

LINN, HELMS, KIRK & BURKETT

5-12-80	Call from Garvin Isaacs; Conference with Wm. R. Burkett; Call to John Sowers; Call from John Sowers; Call from Garvin Isaacs; Call to Suzie Pritchett; Call from Garvin Isaacs	\$ 75.00
*5-12-80	Paid William Skepnek's transportation and expenses to Topeka, Interview clients	152.83
5-14-80	Call from Linda Pence; Call to Erroll Myers	<u>30.00</u>
	Total Due	\$ 5,706.44
	Balance Forward, Credit Balance	<u>(8,845.00)</u>
	Balance Due, Credit Balance	<u><u>\$ (3,138.56)</u></u>